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COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of
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of Minorities
Working Group on Indigenous Populations
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REVIEW OF DEVELOPMENTS PERTAINING TO THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLE: ENVIRONMENT, LAND AND SUSTAINABLE DEVELOPMENT

Note by the Secretariat

Addendum

Information received from indigenous peoples and non-governmental organizations

1. In resolution 1982/34 of 7 May 1982, the Economic and Social Council authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to establish annually a working group on indigenous populations to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, together with information requested annually by the Secretary-General, and to give special attention to the evolution of standards concerning the rights of indigenous populations.

2. The Sub-Commission, in its resolution 1996/31 of 29 August 1996, requested the Secretary-General to invite indigenous and non-governmental organizations to provide information, in particular on matters relating to environment, land and sustainable development. The Commission on Human Rights, in its resolution 1997/32 of 11 April 1997 urged the Working Group to continue its comprehensive review of developments and welcomed its proposal to

highlight specific themes of the International Decade of the World's Indigenous People. In accordance with the resolutions, appropriate communications were sent. The present document contains replies received as of 10 June 1997 from indigenous and non-governmental organizations concerned with the promotion and protection of the human rights and fundamental freedoms of indigenous populations.

THE SAAMI COUNCIL

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[29 May 1997]

Indigenous peoples: land, environment and sustainable development

3. Land and natural resources are the most fundamental concerns for indigenous peoples around the world. Besides the question of self-determination, the access to land and control over it and its resources are central for indigenous peoples throughout the world. Indigenous peoples depend on it for their material and cultural survival. In order to survive, indigenous peoples and their communities need to be able to own, use, conserve and organize their land and resources.

4. Since time immemorial, indigenous peoples around the world have reaped the fruits of their lands and resources without threatening or damaging the ecosystem. Indigenous peoples' traditional concepts based on traditional knowledge and experience of subsistence use and conservation of lands and natural resources are therefore also essential in any attempts at rethinking the present resource demanding and environmentally damaging economic activities.

5. The effects of continually expanding requirements of urban societies are speeding up global economic activities. This of course increases the pressure on indigenous lands and resources. Without a change in the way of thinking and practising, there will be an ever increasing effect on indigenous peoples in the short term and eventually on all of mankind.

6. Indigenous peoples around the world evidence their concept of law and land rights, based on their own customs and traditions, to support their claims that their traditional lands, including its resources, belongs to them and not to the national State. Indigenous claims have generally been negated by applying various versions of the principle of terra nullius.

7. Even if the legal strength of the principle of terra nullius is rather weak today, it is still de facto very much in force when it comes to indigenous land rights. The reason why indigenous rights to land, water and resources still remain unsolved is due to the adaptability of legal arguments and concepts which correspond with the principle of terra nullius. This occurs in many forms, and by the use of various sophisticated arguments as to why past injustices towards indigenous peoples should continue. The time which has passed since the State took possession of the land is often used as an argument, on the premise that new rights have been established during that time regardless of the fact that the original takeover was unlawful. It seems to be a common thing that States try to justify continued injustice towards

indigenous peoples by saying that even if our past takeover of the land was unlawful, it must be considered as lawful today because for such a long time we have been possessing and acting as owners of this land.

8. The present legal situation is a result of this grim unlawful past. It is hard to see how to find a lasting settlement without resolving the core of the problem. This fact cannot be ignored in any serious and constructive attempt to solve this problem, even if it causes some pain in the backbones of the State concerned.

9. The questions concerning indigenous land rights, land use and resource management are equally principal issues for the Saami people - indigenous people of Finland, Norway, Russia and Sweden. The traditional Saami livelihoods include reindeer herding, fishing, hunting and gathering. However, the respective national legislations do not grant land title to the Saami people. Likewise there is limited legal protection against external use of traditional Saami lands which conflicts with Saami interests.

10. The Saami people have their own traditional Homeland, language, culture and history. The Saami people have inhabited parts of Finland, Norway, Russia and Sweden for thousands of years, as documented by the earliest available historical sources.

11. The established official opinion was that the Saami were without any rights to land and that the States, in annexing these lands within their respective national boundaries, had taken possession of "ownerless land". However, for some time Swedish-Finnish legislation recognized Saami ownership of land resulting from the system of Saami villages, where each family owned and used hereditary or tax land. This must, de facto and legally, be interpreted as recognition of Saami ownership.

12. Saami customary law is de facto rejected in national courts. Theoretically according to the principles in the national sources of law the courts should be able to take cognizance of Saami customary law if there is uncertainty or ambiguity. However, Saami customary law is never applied if it is in contravention of national law. In practice only if the law is very unclear can Saami customs be a relevant consideration. Saami customary law and the Saami concept of law have been reflected in very limited scale in the law-making process.

Finland

13. Most of the Saami people in Finland inhabit and use the northernmost part of Finland recognized as the Saami Homeland in the Finnish Constitution and the Saami Act. Within this demarcated area the right to cultural autonomy for the Saami people, through the Saami Parliament, is now acknowledged in the Finnish Constitution and the Saami Act, as a result of legal amendments which came into force on 1 January 1996.

14. The current Finnish legislation does not acknowledge or grant any special land rights to the Saami people in their own Homeland, neither does the legislation acknowledge any exclusive rights for the Saami people to

pursue their traditional livelihoods. Most of the land areas (90 per cent) within the demarcated Saami Homeland in Finland are regarded as State property.

15. The material basis for the Saami culture consists of the land and water in the Saami Homeland, which provide the natural resources for the pursuit of the traditional livelihoods of fishing, hunting, gathering and reindeer herding. In principle all citizens of Finland and the other European Union member States have the same right to land and resources as the indigenous Saami people themselves in their own traditional Homeland. The question of old Saami title to present State land has yet to find a legal solution.

16. The absence of legal acknowledgement and protection of Saami land rights in Finland is due to the principle of terra nullius. The legal principles which created the base for the present Finnish legislation rested on the notion that Saami, as a nomadic people, cannot own or possess land.

17. Furthermore, it was an accepted principle that all land within the State boundaries must have an owner. If land did not have an owner, it was considered as belonging to the State. The Saami were not considered as possessors of land rights, owing to their lifestyle which was defined as primitive and nomadic without any legal effects for the land used by them. The lands which the Saami had considered and used as their own since time immemorial were defined as "ownerless", meaning that the State was the lawful owner.

Norway

18. Like the Saami in Finland and Sweden, the Saami in Norway also have their own national Saami Parliament, elected by and from among the Saami. However, the current Norwegian legislation does not acknowledge or grant any special land rights to the Saami people in Norway

19. The absence of legal acknowledgment and protection of Saami ownership rights to their traditional lands in Norway, as in Finland and Sweden, has its historical background in the principle of terra nullius. However, before 1751 Saami ownership to land in parts of present Finnmark county was recognized for a certain period while this area was under Finnish-Swedish jurisdiction. Although, this area came under Norwegian jurisdiction, State authority was based on a border treaty which had territorial effect only. However, the Saami right to ownership of their ancestral land was never recognized or denied by any formal legislative act after 1751.

20. The notion that the land and water in the northernmost parts of Norway belong to the State started gradually to influence the State administration of the areas. Later, the Norwegian legislative assembly also started to make legal amendments in order to confirm this notion legally. Saami customary law as well as recognized Saami rights during the Finnish-Swedish period were ignored in all legislative actions.

21. This ignorance and rejection of Saami rights in Norway results from the principle of terra nullius, due to the fact that the State could only claim ownership of "ownerless land". This is the historical fact, even if the

present legal justification for the takeover and the present legal status of Saami land rights avoids this type of argumentation. The Saami ownership and possession of the land where they traditionally live are so far not recognized by the Norwegian Government.

22. The Government appointed a Saami Rights Commission in 1980, which inter alia was to look into the Saami rights to land and water. In 1984 the Commission appointed a group of six Norwegian legal experts to study the legal aspects of the question of Saami land rights without including any Saami legal experts. This group of experts submitted its recommendations to the Commission in 1993 and concluded that the State holds title to unregistered land areas in Finnmark county. However, one member of the group was of the opinion that the Saami hold title to the land in Inner Finnmark.

23. In 1995 the Commission appointed another group of legal experts to study the international legal aspects of the question of Saami land rights. The group of experts in international law submitted its recommendations to the Commission in 1997 and concluded that the Saami people have right to ownership and possession of certain traditional areas. The relevant land rights provisions of ILO Convention No. 169 are essential parts of their legal argumentation and conclusions. The expert group also stated that if Norwegian legislation or established conceptions of law fail to comply with the requirements of ILO Convention No. 169 (which was ratified by Norway), the State is obliged to amend such legislation. Furthermore, ILO Convention No. 169 imposes on States the obligation to identify the lands to which indigenous peoples have rights and to guarantee effective protection of their rights in this respect.

The Russian Federation

24. The Saami in Russia do not have their own official institutions. Unlike the three other States encompassing the Saami, where the Saami are the only indigenous people, within the Russian borders there are many other indigenous peoples. Many of the indigenous people of the north of Russia are traditionally hunting, fishing and reindeer-herding peoples like the Saami. What is written here about the Saami in Russia applies also to a certain extent to the other indigenous peoples in Russia.

25. Fishing, in the rivers, lakes and in the Barents Sea has always had great importance for the Saami. Before the establishment of the Soviet Union, the Saami divided the fishing waters between themselves according to the size of their communities. During the Soviet era there were limitations on the Saami fishing rights, but the Saami were entitled to use the land and water for their own subsistence.

26. Under the Soviet regime, the means of production, among them reindeer were collectivized. Many of the State-owned reindeer herding farms in the Soviet Union were multi-ethnic. For example, the Komi, Nentsi and Saami people often herded reindeer together within the cooperative structure of the farm. A programme of forced centralization of the means of production was introduced and implemented. Saami and other indigenous peoples were relocated to large towns, centres for the collectivization programme. In this way, the indigenous peoples were forced to leave their traditional villages, which were

often destroyed to prevent their return. This forced relocation of indigenous peoples resulted in the destruction of indigenous social, cultural and economic structures.

27. In 1992 the governor of Murmansk county issued a decree which gave the local authorities the power to lease all the waters of the Kola Peninsula to persons or organizations offering the highest rent. The decree was issued without reference to any legal basis for the empowerment of the local authorities.

28. The present Constitution of the Russian Federation, adopted in 1993, contains at least three articles which directly apply to the indigenous peoples:

> Article 9
>
> "Land and other natural resources are utilized and protected in the Russian Federation as the basis of life and activity of the peoples living on corresponding territories.
>
> Land and other natural resources can be in private, State, municipal and other forms of property."
>
> Article 36
>
> "Citizens and their associations have the right to possess land as private property.
>
> Possession, utilization and management of land and other natural resources are exercised by the owners freely, if it is not detrimental to the environment and does not violate the rights and lawful interests of other people.
>
> Terms and rules of the use of land are fixed by federal law."
>
> Article 69
>
> "The Russian Federation guarantees the rights of indigenous small peoples according to the universally recognized principles and norms of international law and international treaties of the Russian Federation."

29. Many uncertainties exist concerning the application of these constitutional provisions. There are disputes concerning the concept of private ownership: what are the exact rights and obligations of the owner versus other private parties and the authorities. There is no consensus on this matter in the legislative Assembly (Duma).

30. However, it is clear that the Saami people in Russia today de facto do not hold title to their traditional land and water, and their right to use the land and its resources is also denied. Even basic subsistence use has now been curtailed dramatically.

31. Traditional Saami land and water are now leased to private companies, foreign as well as Russian; about 65 good fishing rivers are leased to private companies. These companies in their turn sell exclusive fishing rights to wealthy foreign tourists. Owing to this system of leasing rivers to private companies, the Saami and other indigenous people in Russia, have hardly any opportunities for fishing for their own daily subsistence needs.

32. Although the Russian Constitution gives indigenous people certain rights, including the right to land and natural resources in their own regions, without the necessary political and legal implementation measures these rights do not have much practical value for the people concerned.

Sweden

33. The Swedish Saami Parliament has no formal legal position with regard to use and management of traditional Saami land. The Swedish authorities acknowledge the Saami as indigenous people, but the Swedish Constitution does not provide any explicit guarantees or protection for the Saami and their culture and traditional livelihoods, as the Finnish and Norwegian Constitutions do.

34. The question of Saami ownership and usufructuary rights in Sweden came up in the Supreme Court in the case which became known as the "Taxed Mountains case". This case took nearly 20 years before it finally came up in the Supreme Court, and the decision was handed down on 29 January 1981.

35. The Taxed Mountains case concerned the claim of Saami ownership of certain areas, mainly in the northern parts of Jämtland county. The Saami party, which consisted of a certain number of reindeer husbandry communities, also counter-claimed several types of curtailed rights to the areas concerned. The questions to be discussed in the court also included law and facts which originated from the Swedish-Finnish period when Saami ownership was officially recognized.

36. The Supreme Court came to the conclusion that the State has to be regarded as the owner of this disputed area (the Taxed Mountains), and that the rights of the Saami have been limited to rights of use. On the basis of this opinion the Supreme Court decided that the Swedish State is the owner of the disputed mountains, and that the Saami only held usufructuary rights to this area. It is noteworthy that none of the respective laws stated who was the owner of the disputed area.

37. Even if the Supreme Court rejected the Saami ownership claim it clearly stated that the Saami have reindeer grazing and fishing rights in the Taxed Mountains, based on a general interpretation of the Swedish Constitution. The Court did not have the same clear opinion concerning Saami hunting rights in the Taxed Mountains, although it said that the Saami most likely also have such hunting rights.

38. However, the Supreme Court rejected the primary governmental claim that Saami as nomadic people cannot acquire title to land. The decision stated that it was possible for the Saami to acquire title to land by using it for traditional Saami economic activities such as reindeer husbandry, fishing and

hunting, without engaging in farming or having a permanent dwelling. The Supreme Court concluded that, even if traditional use of land could establish title to land, the Saami party did not have a proper evidential basis for the claim that such use had taken place in the disputed Taxed Mountains. Although, this recognition was not given legal effect in the disputed Taxed Mountains, it can be of great legal importance for those parts of traditional Saami land not included within the territorial ambit at issue in the Taxed Mountains case.

39. In 1982 the Government appointed a Saami Rights Commission to study questions concerning Saami rights, including Saami land rights. However, this did not lead to any positive measures in favour of Saami land rights.

40. The Saami culture and livelihoods - reindeer husbandry, hunting and fishing - are today facing threats from the Swedish urban society and its demand for the opportunity to fish and hunt in Saami areas which up to recently have been an intrinsic part of exclusive Saami reindeer herding rights. In 1992 the Swedish Parliament adopted legislative measures affecting traditional Saami hunting and fishing rights. The Swedish Legislative Assembly decided that all traditional Saami hunting grounds shall be accessible and open for all Swedish citizens. This change took place despite the principle support for Saami land rights in the Supreme Court 11 years earlier in the Taxed Mountain Case.

41. The 1992 legislative measure made possible unrestricted small-game hunting and fishing for non-Saami in traditional Saami areas. Until this change took place, hunting and fishing in Saami areas had been considered an exclusive Saami right.

42. The Saami filed a case which failed in the Swedish Supreme Administrative Court, inter alia because of legal technicalities. The complaint was declared inadmissible by the Commission on 25 November 1996 (Application No. 27033/95). The Commission noted that the rights concerned are "civil rights" within the meaning of the Convention. The Commission recalled that the Saami villages may bring proceedings against the State in the ordinary courts, requesting these courts to declare that the Saami, rather than the State, have the rights which they claim. Thus the application was declared inadmissible. The Saami party later took the case to the European Commission on Human Rights.

THE ASSOCIATION OF INDIGENOUS VILLAGE LEADERS IN SURINAME

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[4 February 1997]

Land and environmental concerns of indigenous peoples in Suriname

43. Indigenous peoples in Suriname are presently without even the most rudimentary legal protections. Contrary to the practice of most other States in the Western hemisphere, Suriname does not recognize that indigenous peoples have any legal rights to their lands and resources. Indigenous peoples are also routinely ignored in decisions concerning land and resource use.

In addition to a lack of legal guarantees, the Government of Suriname has granted or is in the process of granting multiple concession areas to multinational companies, many of which have dubious environmental and human rights records. The hand-out of logging and mining concessions on or near indigenous lands and territories is about to increase dramatically.

44. The Government recently rejected draft contracts for logging concessions of between 3 and 5 million hectares, in favour of concessions no larger than 150,000 hectares. On its face, this appears to be good news. However, 150,000 hectare concessions may be granted without independent approval, and monitoring capacity remains virtually non-existent. There also appears to be no limit on the amount of 150,000 hectare concessions that may be granted, which is especially troubling given that front companies have been used to circumvent restrictions on concession size in the past.

45. In November 1996, the Government placed a 12-page advertisement in the industry leading Mining Journal intended to promote investment in the mining sector. Also, on 25 and 26 January 1997, a conference was held in the capital, Paramaribo, on the gold mining industry, which was attended by the President, ministers and representatives of multinational and local mining companies. Suriname views gold as a substitute for the declining bauxite industry and is aggressively pursuing investment. The Mining Decree of 1986 is being revised and a new investment law is in the works that will facilitate increased investment in the gold and diamond mining industry.

46. The Government has established a Commission on Land Rights to, in its words, examine the problem of indigenous and tribal peoples and State-owned land. Indigenous peoples and Maroons are not represented on this Commission and it has stated that it has no intention of meeting with the Association of Indigenous Village Leaders in Suriname, but prefers to meet with individual communities. Its hearings to date have been private and its mandate is unknown. The recent Gran Krutu (Great Gathering) of indigenous and Maroon leaders stated that it was a violation of their fundamental human rights for the Government to attempt to discuss land rights without their full and meaningful participation. The Association of Indigenous Village Leaders in Suriname stated in a recent letter to the President that international standards should be the basis for addressing land rights and the role of a commission should be nothing more than identifying the means of implementing these standards. The Government and its Commission have thus far refused to use or even consider international standards on land rights.